Lockheed Martin Astronautics *and* Joseph F. Fiala and Anthony H. Romano *and* Lee Gutierrez. Cases 27–CA–14557, 27–CA–14600, 27–CA–14605, and 27–CA–15118

January 6, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On November 18, 1997, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions with supporting argument.[1] The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

1. The Charging Parties are security guards employed at the Respondent's Littleton, Colorado facility. They are represented by the Plant Guard Workers under a collective-bargaining agreement with the Respondent. The contract contains a grievance-and-arbitration procedure.

In February 1996,[4] Charging Party Joseph Fiala was told by fellow guard Jolene Conn that she had medical restrictions that prevented her from wearing a sidearm and from handling classified trash. Fiala was concerned that Conn could not effectively back up other guards in situations requiring a weapon, and that other guards would have to handle the trash that Conn otherwise would have handled. At about the same time, Conn told Charging Party Lee Gutierrez about her medical condition (but not her medical restrictions).[5] On April 3, Supervisor Jerry Kendell told Gutierrez that Conn had some medical restrictions.

Around April 8, Gutierrez talked to Fiala and guard Steve Piccioni about how Conn's medical restrictions might affect her work assignments. Fiala and Gutierrez discussed filing a grievance. They also called steward Dave Stertz and told him of their concerns that Conn would be unable to back up other guards, that she was violating the contract by not doing classified trashing, and that she might be depriving other guards of overtime opportunities by working at posts for which other guards would be more qualified.

Conn soon learned of the other guards' conversations about her physical limitations and filed an internal complaint with the Respondent, contending that the talk had created a hostile work environment. On April 11, Supervisor Kendell told Stertz, Fiala, and Gutierrez to stop talking about Conn's medical restrictions. Fiala explained that they had discussed Conn's situation because they were considering filing a grievance. He suggested that Conn be assigned to a post where her medical restrictions would not pose problems. Kendell said that he did not make those decisions, and repeated that the employees should not discuss the issue. Fiala countered that he thought the matter was grievable and that he was entitled to discuss it with union officials. Kendall said, "You heard what I told you."

The judge found that, in discussing the effects of Conn's medical restrictions on other guards as possibly grievable, the employees were discussing working conditions that affected them, and thus were engaged in protected concerted activity. He therefore found that Kendell violated Section 8(a)(1) by directing them not to speak of those issues.

In its exceptions, the Respondent contends that the judge failed to take account of its obligations under the Americans with Disabilities Act (ADA)[6] to prevent development of a hostile work environment, to avoid harassment of and retaliation against employees with disabilities, and to maintain the confidentiality of medical information. The Respondent argues that its restrictions

[1] We grant the Respondent's motion to amend its exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge recommended that several complaint allegations be dismissed. No exceptions were filed to the recommended dismissals.

We correct several erroneous or misleading statements by the judge, none of which are material to our decision. Contrary to the judge, witness Rick Hernandez testified that at an investigative interview on April 24, 1996, Charging Party Anthony Romano denied having discussed employee Jolene Conn's medical *conditions*, not her medical *restrictions* (i.e., her work limitations resulting from her medical conditions). Also, although the judge's finding that neither Romano nor Hernandez was aware of the purpose of that meeting is supported by a portion of Hernandez' testimony, Hernandez also testified that, when Romano was asked if he knew why he was at the meeting, he replied that he had heard a rumor that someone had made allegations against him. Finally, although Hernandez testified that Romano was concerned over the safety implications of Conn's inability to carry a sidearm, he did not, contrary to the judge, testify that Romano informed his supervisor, Jerry Kendell, of that concern. However, it is clear that Romano, like other employees, was discussing Conn's medical restrictions as they related to the employees' working conditions. Thus, whether or not he informed Kendell of the basis for his concerns is irrelevant.

[3] The judge inadvertently failed to provide a remedy for supervisor Kendell's unlawful instruction to employees to refrain from discussing the effect of employee Jolene Conn's medical restrictions on their working conditions. We shall add the appropriate provisions to the recommended Order and notice. We shall also modify the Order consistent with the Board's decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[4] All dates refer to February 1996 through January 1997.

[5] The term "medical *condition*" refers to Conn's physical problems; the term "medical *restrictions*" refers to the kinds of work she was unable to do because of her medical conditions.

[6] 42 U.S.C.A. § 12101, et seq.

on employee discussions were justified by its need to fulfill those obligations and to effectively investigate Conn's discrimination allegations.[7] On consideration we disagree with the Respondent's argument.

We recognize that the Respondent has obligations under other statutes, including the ADA, that may in some circumstances justify the prohibition of certain kinds of speech and conduct. As the Board has previously held, however, any such prohibitions must be narrowly tailored in order to avoid unnecessarily depriving employees of their Section 7 rights.[8] With one exception, which we discuss below, the Respondent's prohibitions were not narrowly tailored to meet its ADA concerns. As the judge found, the Respondent prohibited all discussion of Conn's medical restrictions, even though those restrictions might have adversely affected other employees' working conditions, and even though some of the employees were considering filing a grievance over the manner in which the Respondent had accommodated the restrictions.[9] In addition, the Respondent warned employees not to discuss discipline or disciplinary investigations with *anyone*, again despite the fact that the investigation in question concerned Conn's ADA complaint, which was triggered by their discussions of her medical restrictions. Thus, although the employees had discussed matters that potentially affected their conditions of employment and were actively discussing filing a related grievance, the Respondent attempted to prevent them from discussing those matters entirely, not merely in ways that might be construed as harassing or retaliatory. The Respondent cites no provision of the ADA or its implementing regulations, and we have found none, that even suggests that an employer may announce such sweeping prohibitions on protected activity in the name of ADA compliance.

2. During the course of an investigative interview on April 24, Romano acknowledged to the Respondent's employee relations administrator, Deanna Duca, and its EEO administrator, Kathy Campbell, that he had discussed Conn's medical restrictions with Supervisor Kendell. Romano said, however, that he had not intended to say anything derogatory about Conn and that he would apologize to her. The supervisors told him not to confront Conn; Campbell testified that she gave that instruction because, in her experience, apologies turn into disputes.

About May 1, Romano did attempt to apologize to Conn, but the conversation apparently turned confrontational. The Respondent issued written reprimands to both employees, which stated that, contrary to the Respondent's instructions, they had discussed issues pertaining to the Respondent's investigation of Conn's complaint. Romano's reprimand also noted that he had attempted to apologize to Conn after having been told not to do so.

The judge found that the Respondent's reprimanding of Conn and Romano for discussing Conn's complaint violated Section 8(a)(3) and (1) because the discussion was work related and thus protected by Section 7. The Respondent has excepted to this finding, arguing that Romano acted on his own in approaching Conn and that their conversation was therefore not concerted and not protected. We find merit to this exception.

As neither Conn nor Romano testified, the record does not indicate the content of their conversation, other than that it started as an attempted apology and degenerated into a confrontation over the general subject of the ADA investigation. There is, however, no evidence that they were talking about wages, hours, or working conditions in a way that might have led to concerted action, or that Romano was attempting to induce Conn to make common cause with him or with other employees regarding work-related matters.[10] In sum, there is no showing that they were engaged in protected activity in the course of their conversation. We, therefore, find that the Respondent did not violate the Act by reprimanding them, and we shall dismiss that allegation of the complaint.

3. On May 1, the Respondent suspended Charging Party Lee Gutierrez for 3 days. Two reasons were given for the suspension. One was that Gutierrez had disobeyed the Respondent's instructions and talked to other employees about the investigation of Conn's ADA complaint. The other was that he had made threatening remarks to guard Steve Piccioni. Administrator Duca testified that Gutierrez would have been suspended for the threats alone, even without his breach of the confidentiality instruction.

[7] The Respondent argues that the judge erroneously stated that it imposed its confidentiality requirement in order to avoid conflict. Even if the judge inaccurately suggested that conflict avoidance was the only reason for the requirement, his error was harmless, because the Respondent's other stated reasons for the requirement are not sufficient to justify the infringement of protected Sec. 7 rights.

The Respondent's contention that its restrictions were necessary to preserve the confidentiality of medical information is particularly unpersuasive. As the judge found, the issues in this case arose when Conn herself informed Charging Party Joseph Fiala about her medical restrictions and Charging Party Lee Gutierrez about her medical condition.

[8] *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), cert. denied 117 S.Ct. 2508 (1997).

[9] Contrary to the Respondent, it is irrelevant whether the employees' concerns over the effects of Conn's medical restrictions were well-founded or that they did not file a grievance over those matters. What is relevant is that the employees were discussing both the potential effects of her restrictions on their working conditions and the possibility of filing a related grievance. Such conversations are concerted activity protected by Sec. 7, *Medeco Security Locks*, 319 NLRB 224, 228 (1995), affd. 322 NLRB 664 (1996), enfd. in relevant part 142 F.3d 733 (4th Cir. 1998), whether or not they result in organized action. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

[10] Cf. *Meyers Industries,* 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

On January 30, 1997, Gutierrez was discharged. His discharge notice stated that he was being discharged for leaving the plant premises without permission on January 22, 1997, and after "careful consideration of [his] past work record." Duca testified that the Respondent took Guttierrez' entire disciplinary record into account in deciding to discharge him, and that Gutierrez probably would not have been discharged solely for leaving the premises without permission.

The judge found that both the May 1 suspension and the January 30 discharge of Gutierrez violated Section 8(a)(3) and (1). With regard to the suspension, the judge reasoned that because the Respondent's restrictions on employee discussions of Conn's medical restrictions were unlawful, "to the extent that Gutierrez' 3-day suspension was based on such discussions," the suspension also violated the Act. With regard to the discharge, the judge implicitly found that the General Counsel had established that Gutierrez' protected activity was a motivating factor in the Respondent's decision to terminate him. He also implicitly found that, because it considered Guitierrez' entire displinary record—including discipline that had been unlawfully imposed—in making that decision, the Respondent had failed to demonstrate that it would have discharged him even if he had not engaged in protected discussions.

In its exceptions, the Respondent argues that Duca's testimony demonstrated that it would have suspended Gutierrez in May for the threats to Piccioni, even absent his discussions which we have found to be protected, and therefore that the suspension was not unlawful.[11] It further argues that, as a result, it was not unlawful to rely on the suspension in deciding to discharge Gutierrez. It also argues that a "counseling" of Gutierrez on April 24, in which he (like the other Charging Parties) was instructed not to discuss other employees' medical restrictions, was not discipline and therefore was not part of the disciplinary record relied on in making the decision to terminate him. Accordingly, the Respondent contends that the discharge was lawful because it was not based on any unlawful prior discipline.

We find it necessary to remand these two issues to the judge for further consideration. In cases such as this, when an employer is charged with discriminating against an employee in violation of Section 8(a)(3), the burden is on the General Counsel to demonstrate that the employee's union or other protected activity was a substantial or motivating factor in the employer's decision. If the General Counsel carries that burden, the burden then shifts to the employer to prove that it would have taken the same action even absent the employee's protected activity.[12]

The judge failed to apply this analysis with regard to Gutierrez' May suspension. He found instead that the suspension was unlawful *to the extent* that it was based on Gutierrez' protected conversations. That finding is inadequate, however, because while the suspension was based in part on those discussions, it would not be unlawful at all if the Respondent were found to have shown that Gutierrez would have been suspended in any event because of his threats to Piccioni. That is not a finding the Board can make, because it may depend in part on the judge's evaluation of Duca's credibility, including his assessment of her demeanor as a witness. We must, therefore, remand this issue to the judge for further analysis under *Wright Line*.

The judge did analyze Gutierrez' discharge under *Wright Line*. Thus, he implicitly found that the Respondent had not shown that it would have fired Gutierrez had it not been for his protected activity, because it relied on his entire disciplinary record and the judge found that some of that discipline was unlawful. As we have found, however, the judge did not apply the proper analysis to Gutierrez' May suspension, and thus it has not yet been determined whether the suspension was unlawful under *Wright Line*.

The General Counsel argues that, in any event, Gutierrez' April 24 counseling for "inappropriate comments and behavior" constituted unlawful discipline. The Respondent contends, however, that, as both Duca and Campbell testified, it did not consider the counseling to be discipline at all, and that, for that reason, Duca did not consider it part of Gutierrez' disciplinary record when deciding to discharge him. The judge did not discuss that testimony, the validity of which again depends in part on the judge's assessment of the witnesses' credibility.

Moreover, the April 24 counseling of Gutierrez was not alleged in the complaint to be unlawful discipline, and it is not clear whether the judge found it to be so, although there are indications in his decision that he did. For one thing, he included the counseling along with the May suspension among the items of discipline considered by the Respondent in making the discharge decision, while omitting any mention of the other, lawful, instances of discipline. The judge also, in his recommended Order, referred to the unlawful *reprimands* of Gutierrez, which presumably included the April 24 counseling.[13] However, we cannot determine with certainty whether he based his finding that Gutierrez' discharge was unlawful in part on the April 24 counseling.

Since the May suspension and the April counseling are the only arguably unlawful instances of discipline meted out to Gutierrez, we cannot determine at this time whether the judge correctly found that he was unlawfully

[11] *Wright Line*, 251 NLRB 1083 (1980). The Respondent did not separately except to the judge's finding that the May suspension was unlawful, but it clearly argues to that effect in support of its exceptions.

[12] Id. at 1089.

[13] In their briefs, the parties seem to assume that the judge did find the April 24 counseling unlawful.

terminated.[14] We shall, therefore, sever the complaint allegations relating to Gutierrez' May suspension and January 1997 discharge and remand them to the judge for further findings and analysis of the issues discussed above.

ORDER

The National Labor Relations Board orders that the Respondent, Lockheed Martin Astronautics, Littleton, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees to refrain from discussing the potential effects of other employees' medical restrictions on their working conditions.

(b) Promulgating and maintaining a rule prohibiting employees from discussing employee discipline and disciplinary investigations with anyone.

(c) Warning and reprimanding employees because they discussed matters that may be grievable under their collective-bargaining agreement or because they engaged in any other union or protected concerted activity.

(d) Telling union representatives to shut up during the course of investigatory interviews with employees.

(e) Coercively interrogating employees concerning their union or other protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting employees from discussing employee discipline and disciplinary investigations with anyone.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning of Anthony Romano and the unlawful reprimand of Joseph Fiala, and within 3 days thereafter notify the employees in writing that this has been done and that the actions will not be used against them in any way.

(c) Within 14 days after service by the Region, post at its Littleton, Colorado facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent violated Section 8(a)(3) and (1) by suspending Lee Gutierrez in May 1996 and by discharging him on January 30, 1997, are severed and remanded to the administrative law judge for consideration of the matters discussed in part 3, above.

IT IS FURTHER ORDERED that the judge shall make the credibility determinations and factual findings necessary to resolve those issues, and that he shall prepare and serve on the parties a supplemental decision setting forth those determinations and findings, conclusions of law, and a recommended Order based on those determinations, findings, and conclusions. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities

WE WILL NOT warn employees not to discuss the potential effects of other employees' medical restrictions on their working conditions.

[14] The General Counsel argues that because Gutierrez' discharge was based in part on his May suspension, it was therefore unlawful even if the suspension was not unlawful. The General Counsel reasons that, because the Respondent took the suspension into account in discharging Gutierrez, and because the suspension was imposed in part because of his protected discussions, it follows that the discharge was motivated in part by those discussions. This argument can be considered by the judge on remand, if necessary.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT promulgate and maintain a rule prohibiting employees from discussing employee discipline and disciplinary investigations with anyone.

WE WILL NOT warn or reprimand employees because they discussed matters that may be grievable under their collective-bargaining agreement or because they engaged in any other union or protected concerted activity.

WE WILL NOT tell union representatives to shut up during the course of investigatory interviews with employees.

WE WILL NOT coercively interrogate employees concerning their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our rule prohibiting employees from discussing employee discipline and disciplinary investigations with anyone.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning of Anthony Romano and the unlawful reprimand of Joseph Fiala, and WE WILL within 3 days thereafter notify the employees in writing that this has been done and that the actions will not be used against them in any way.

LOCKHEED MARTIN ASTRONAUTICS

Michael T. Pennington, Esq., for the General Counsel.
Matthew Coyle, Esq. and *Ann Robins, Esq.,* for the Respondent.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Denver, Colorado, on July 28–29, 1997.[1] Individuals, Joseph F. Fiala, Anthony H. Romano, and Lee Gutierrez, have charged that Lockheed Martin Astronautics (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits that the United Plant Guard Workers of America, Local 265 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a national manufacturer of aerospace components and systems with a facility in Littleton, Colorado. The Charging Parties are employed as security guards by the Respondent at the Littleton facility. The guards are represented by the Union and are covered by a collective-bargaining contract with the Respondent which contains a grievance and arbitration procedure.

III. DISCUSSIONS CONCERNING A GUARD'S MEDICAL RESTRICTIONS

In February 1996 Joseph Fiala learned from fellow guard, Jolene Conn, that she had some medical restrictions. Because of the restrictions she was not wearing a sidearm and was not assigned to handle classified trash. Fiala subsequently discussed Conn's situation with fellow guards and union representatives. Fiala was concerned that Conn was assigned to posts that required a sidearm and she could not back up fellow guards if the situation required a weapon. Additionally, Fiala disliked the fact that Conn was assigned to posts that required handling classified trash and she was not performing this work, thus leaving additional work for fellow guards.

At around the same time, guard Lee Gutierrez had conversations with Conn where she volunteered information about her medical condition. On April 3 Gutierrez had a conversation with his supervisor, Jerry Kendell, who mentioned that Conn had some medical restrictions. Another supervisor, Erickson, also mentioned to Gutierrez that Conn was off work due to surgery. On about April 8 Gutierrez had a conversation with fellow guards, Steve Piccioni and Joseph Fiala, about Conn's physical restrictions and how that might effect her work assignments. Fiala expressed his concerns about Conn's inability to perform the work and the effect on the other guards. Fiala asked if the situation would qualify as a grievance. At the time Gutierrez was the Union's recording secretary. Gutierrez said that he was not certain about the filing of a grievance and that Fiala should consult with Union Steward Dave Stertz. Fiala and Gutierrez then talked to Stertz and expressed their concerns about Conn not being able to backup other guards with a weapon. They also were worried about her not doing classified trashing and the possible loss of overtime opportunities because Conn was working posts that others would be more qualified to handle. Stertz agreed to check into the situation with Union president, Rick Hernandez.

IV. SUPERVISOR KENDELL PROHIBITS DISCUSSION OF CONN'S MEDICAL STATUS

The talk about Conn's physical limitations got back to her and she soon filed an internal EEO complaint with the Respondent alleging the talk created a hostile work environment. On approximately April 11, Supervisor Kendell met with Stertz, Fiala, and Gutierrez and told them of Conn's EEO charge. Kendell told the men that he wanted them to stop talking about Conn's medical restrictions. Fiala protested that the reason they had discussed Conn's situation was because they were considering filing a grievance. Fiala also suggested to Kendell that Conn be assigned to other posts where her medical restrictions could be accommodated and she would not have to carry a weapon or do classified trashing. Kendell said he did not make those decisions. Kendell then reiterated that the men should not talk about the matter. Fiala again protested that he still believed it was a grievable matter and that he was within his rights discussing it with union officials. Kendell responded: "You heard what I told you." Kendell did not testify.

The guards were discussing work conditions that effected them and which they were considering as a possible grievable matter. This activity is statutorily protected by the Act and

[1] All dates refer to the time period February 1996 through January 1997, unless otherwise stated.

Kendell's uncontroverted instruction to them to stop discussing the matter was unlawful. I find that the Respondent violated Section 8(a)(1) of the Act when Kendell prohibited the men from conferring about the effect of Conn's medical restrictions.

V. FIALA CONTINUES TO DISCUSS POSSIBLE GRIEVANCE

Approximately a week after the meeting with Kendell, Fiala had a conversation with another supervisor, J. T. Prater, about Conn's working overtime. Fiala asked Prater if Conn was under any restrictions that would have prevented her from working the post to which she was assigned. Prater told him she was not. Fiala asked if Conn had to wear a weapon on her assigned post, and Prater was unsure of that requirement. Fiala testified he thought Conn may have been working overtime that should have been assigned to him.

VI. GUTIERREZ' STATEMENTS TO PICCIONI

On April 16 Gutierrez was at the pistol range to participate in qualification shooting. He and Piccioni graded each others' target and they had a disagreement over the score that Gutierrez received. Gutierrez admitted he said to Piccioni if he did not agree to give him a higher score "he guessed we'd have to mess you up." The following day Gutierrez came up to Piccioni at his guard post and noticed that Piccioni was writing in a book. Piccioni closed the book when he saw Gutierrez approach. Gutierrez said, "I hope you're not writing about me in there or I'll have to put more holes in you than I did in those targets yesterday." Piccioni eventually related these encounters to management.

VII. APRIL 24 INVESTIGATORY INTERVIEWS

A. Romano

On April 24 guards Anthony Romano, Fiala, and Gutierrez were individually summoned by Respondent's employee relations administrator, Deanna Duca and EEO Administrator Kathy Campbell, to "fact finding" sessions about Conn's EEO complaint. The Respondent acknowledges the meetings were investigatory interviews that might result in discipline. Thus, Duca had earlier notified Union Representative Rick Hernandez of the meetings and he also was present for each of the interviews

Romano was interviewed first. Neither Romano nor Hernandez was aware of the purpose of the meeting. Hernandez asked to speak privately with Romano. Duca told him they could not meet in private at that time. Hernandez then presented management officials, including, Jay Buehler, manager for employee relations, whose office was next door, with cards the Union had issued him. The cards recited the Union's interpretation of employees' rights to representation in investigatory meetings as set forth in the *Weingarten* case.[2] After Buehler considered the matter he permitted Hernandez and Romano to meet in private before the interview meeting continued.

Campbell then explained that the EEO department was conducting a factfinding investigation and wanted to ask Romano about information he might have. Duca and Campbell told Romano that the interview was to be confidential and he was not to speak to anyone about the contents of the meeting. Romano was then asked if he had made statements concerning Conn about her not shooting and trashing, and "what's wrong with her this time?" Romano replied that he had mentioned to Supervisor Kendell that Conn was working a post that required a weapon and she had not signed out for one. Romano denied speaking of Conn's medical restrictions. He stated he was concerned about safety because she was assigned a post that would be his backup and she was not armed. The management representatives told him it was inappropriate for him to discuss other persons' medical restrictions. Romano said he had never intended to say anything derogatory about Conn and he would apologize to her. The supervisors told him not to confront her. Romano said he would not confront her but only attempt to apologize.

Duca then told Romano that they would consider the meeting a counseling which would be noted on his attendance record. Romano then left and Hernandez and Duca had a discussion about employees' *Weingarten* rights. Hernandez said he would give each interviewee a card explaining those rights as they arrived. If the employee wanted to meet with him he would support that and if they did not he felt that was the employee's choice.

The Government contends that the counseling given Romano on April 24 was unlawful because he was engaged in protected concerted activities in discussing the Conn situation with his supervisor. The Respondent contends that the warning was justified because he was not engaged in concerted activity. The collective-bargaining contract makes employee safety an obligation of the Respondent.[3] I find that Romano was engaged in protected concerted activities when he complained to supervisor Kendell about the safety implications of Conn's medical restrictions. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). I further find that by noting a warning on Romano's attendance record for engaging in such protected activity the Respondent violated Section 8(a)(1) and (3) of the Act.

Fiala

Joseph Fiala was the next guard called in for an interview. Duca and Campbell informed him that he was not to discuss the interview with anyone as it was confidential. He was asked questions about the speed with which guard patrols were performed and training. Fiala finally asked what that had to do with an EEO investigation and he was told by Campbell that she just wanted some background. He was asked about comments being made about trashing and shooting. He stated that the only time that subject had come up was when asking supervisors about an unqualified employee working a post. He stated that the discussion had taken place with Supervisor Kendell. Fiala said he mentioned Conn's medical restrictions because of his concern that someone unqualified may be working and that may have an effect on overtime work that guards would get. Fiala said he talked to some supervisors relating to filing a grievance concerning "rocking chair" money (pay for work improperly assigned to another employee).

Duca asked him about discussions he had with other employees. Fiala said he had discussions with union officials concerning a grievance, and he was not certain that the Respondent was entitled to know what they discussed. Duca became angry and told Fiala that the Respondent was conducting an important

[2] *NLRB v. Weingarten, Inc*., 420 U.S. 251 (1975).

[3] "The Company shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment. Protective and safety devices and other equipment necessary to properly protect employees from injury shall be provided by the Company in accordance with the practices now prevailing in the plant." (R. Exh. 11, p. 54, art. XVIII, sec. 1.)

EEO investigation that could lead to disciplinary action, including discharge, and he was to cooperate. Fiala, however, did not disclose the names of other employees with whom he had discussed the matter.

Fiala mentioned that a preliminary process before a grievance is filed is an Informal Departmental Communication (IDC) whereby an employee attempts to work out any grievances with his immediate supervisor. Duca asked for an explanation of what an IDC was and was told the meaning. Duca told Fiala the investigation had nothing to do with grievances and he should not concern himself about that which was a different matter. She stated that grievances were the Union's business and that was not his responsibility. The meeting concluded by Fiala being told that the Respondent might need to discuss the matter with him further.

C. Gutierrez

The last guard interviewed was Lee Gutierrez. When he arrived Duca asked him if he needed to meet first with Hernandez and Gutierrez replied that he did. The two men then talked privately. Duca then told Gutierrez the interview was confidential and he should not discuss it with anyone. When the interview started Gutierrez was asked if he knew why he had been summoned. He said that he believed it was because of the EEO complaint Conn had told him she had filed.

Gutierrez was asked about his comments to Piccioni relating to messing him up and putting holes in him. Gutierrez admitted making such statements but explained that he and Piccioni frequently kidded each other and the comments were only a joke.

Gutierrez was asked about various comments among employees including "shooting and trashing." Gutierrez said he had not made such statements but he had heard the statements made. When asked by whom, Gutierrez asked to meet privately with Hernandez. They were allowed to confer and when they returned, Gutierrez said he did not want to disclose whom he had heard make such statements. Duca asked if that was because the Union had told him not to answer. Gutierrez said it was not, that he just did not want to "rat" on anyone. Duca became angry and said that she would give him a direct command to answer the question. Hernandez protested that she could not give Gutierrez a direct order because she was not in his chain of command. Duca stated that she would suspend him or do whatever it took to get his cooperation. Campbell said they would just move on.

Gutierrez was then chastised for making the threatening statements to Piccioni. He was told that his remarks could be misperceived. The meeting was concluded with the Respondent's representatives telling Gutierrez they might need to speak to him later.

Campbell testified what she meant when the employees were told to keep the investigation confidential:

> When I ask a person to maintain the confidentiality of an investigation, I would expect that they would not go out and continue to discuss the issues; for instance Jolene Conn's medical restrictions, and their opinions about whether she can or can't do their job, and that they would not approach Jolene about the allegations that she brought forth. [Tr. 275.][4]

[4] Duca testified to a similar purpose for invoking the confidentiality warning. (Tr. 232.)

The Government alleges that the Respondent unlawfully promulgated and maintained a rule prohibiting employees from discussing employee discipline and disciplinary investigations with anyone. The Respondent cites the need for avoiding conflict among employees as the reason for requiring confidentiality. The Respondent placed a confidential cloak over that subject when it told the employees they could not discuss the issues under consideration with other employees. Such an all encompassing prohibition did not properly safeguard the employees' rights under the Act. I find that by invoking such a limiting rule for the employees the Respondent unlawfully restrained and coerced them contrary to their Section 7 rights and the Respondent thereby violated Section 8(a)(1) of the Act. *Medeco Security Locks*, 319 NLRB 224, 228 (1995).[5]

The Government further alleges that the Respondent unlawfully interrogated the employees concerning their protected concerted activities in the April 24 interviews. I find that the interview of Romano was not unlawful interrogation. Union Representative Hernandez was present to represent Romano's interests. Neither he nor Romano balked at discussing what Romano may have said to Supervisor Kendell concerning Conn. With regard to Fiala he did protest that he was concerned that the Respondent was inquiring into protected activity. Under the circumstances, the Respondent transgressed the legitimate line of inquiry into the EEO matter when Duca insisted that Fiala tell her about protected activity. I find that the Respondent did unlawfully interrogate Fiala on this occasion. The examination of Gutierrez was similar. He protested he did not want to "rat" on fellow employees he heard discussing Conn's medical restrictions. He was threatened by Duca with punishment if he did not tell her what she wanted to know. I find that Gutierrez was also unlawfully interrogated concerning the protected activities of fellow employees. I find that the Respondent violated Section 8(a)(1) of the Act by the interrogations of Fiala and Gutierrez.

VIII. MAY 1 MEETINGS

A. Fiala

On May 1 Fiala was called to another investigatory meeting with Duca and Campbell. Union Representative Stertz was also present. He asked what the meeting was about and Duca told him to shut up as she was asking the questions. Stertz, however, did ask questions during the meeting. Duca accused Fiala of lying in the April 24 meeting about talking to supervisors relating to filing a grievance concerning "rocking chair" money. Fiala explained that he was considering a grievance and that it would be against the Respondent and not against Conn. Duca said she did not believe Fiala had cooperated in the investigation. She testified that Fiala had continuously brought up the filing of a grievance in the previous meeting. Duca told Fiala that he was receiving a written warning for his behavior. Fiala said that was fine but he had the right to appeal that action. Duca reiterated that the matter was an EEO investigation and he was not to discuss it with anyone. Fiala said that for purposes of his appeal he would have to discuss it with his union officials. The Respondent's representatives disagreed with this,

[5] The same confidentiality warnings were given to employees at the May 1 interviews discussed below. My finding of a violation of Sec. 8(a)(1) applies equally to the warnings given by the Respondent in those interviews.

and Fiala said to Stertz they would have to go to the NLRB with the matter.

Fiala was given a written warning for inappropriate comments and behavior resulting in a hostile work environment for a coworker, and for not cooperating in the Respondent's investigation. The Respondent did not call as witnesses any of the supervisors that Fiala testified he expressed his concerns to regarding Conn. It was the alleged responses of these supervisors that Duca based her conclusion that Fiala was lying.

The Government argues that Duca's telling Stertz to shut up as she was asking the questions was a violation of Fiala's *Weingarten* right to union representation during an investigatory interview. I find that Duca's statement to Stertz was an improper attempt to limit his role in the interview. Even though he ultimately asked questions that does not excuse Duca's effort to confine his participation during the interview. I find that Respondent violated Section 8(a)(1) of the Act by telling Stertz to shut up when he asked the purpose of the meeting.

I further find that the attempt to limit Stertz had a coercive effect on the questions asked of Fiala concerning who had been talking about the Conn matter. I find that this inquiry, considering all the circumstances of the interview, was an unlawful interrogation as to employees' protected activities. The Respondent thereby additionally violated Section 8(a)(1) of the Act.

The complaint alleges that the written warning given to Fiala on May 2 was unlawful because it was directed to his protected concerted activity. Again the Respondent contends it had a right to prohibit employees' discussions of the subject under inquiry. The warning went, in part, to Fiala's discussions with supervisors about his concerns for Conn's restrictions on working conditions. It further punished him for "not cooperating." It was clear that Fiala's repeatedly mentioning a potential grievance was the behavior that Duca relied on for her conclusion that he had not cooperated in the investigation. Fiala had the right to pursue a possible grievance with his supervisor and to openly discuss his concerns with other employees and the Respondent's labor relations representative. I find that the warning given Fiala for engaging in this protected activity is a violation of Section 8(a)(1) and (3) of the Act.

B. Gutierrez

On May 1 Gutierrez was also called to an investigatory meeting with Duca and Campbell as a followup to the Conn complaint. Union Representative Dave Stertz was present at the meeting. Duca again reminded Gutierrez that he was not to discuss the investigation with anyone. Duca told Stertz that she would give him an opportunity to ask questions and he could meet with Gutierrez at the conclusion of the meeting. Duca questioned Gutierrez as to whether he had discussed the matter with anyone since their previous meeting. He said that an employee had asked him why he had come to the earlier meeting and he told the employee, "Nothing. The same old same old."

Duca also asked Gutierrez to again tell her who had been talking about Conn's medical condition. Gutierrez asked to confer with Stertz before answering and the two met privately. When they returned Duca told Gutierrez if he did not answer her question he would be suspended and that could lead to his termination. Gutierrez then told Duca that Piccioni and Fiala had discussed Conn's medical restrictions. Gutierrez was again warned by Duca at the end of the meeting that everything said in the interview was confidential. He was told he was not to discuss the meeting with anyone and failure to comply could lead to his termination. Duca informed Gutierrez that he was suspended for 3 days for making the threatening remarks to Piccioni and because he had talked to other employees about the EEO investigation. Duca testified that this meeting was not investigatory as she was anticipating issuing the suspension before the meeting.

Gutierrez received a written confirmation of his suspension which lists the Piccioni encounters and his discussion with fellow employees concerning the investigation as the reasons for the suspension. The letter states in part: "[Y]ou admitted you had talked with fellow employees regarding this investigation. You were given specific instructions by this Employee Relations Administrator and Kathy Campbell from the EEO Department on April 24, 1996, not discuss with anyone awareness of or issues concerning the investigation. Gutierrez' letter also advises him that future violations of company policies and procedures could cause his discharge. (G.C. Exh. 2.) Guiterrez subsequently filed a grievance over his suspension but the matter was not resolved in his favor.

The Government alleges that the suspension of Guiterrez is unlawful because it resulted, in part, from his protected concerted activities of discussing the Conn matter with fellow employees. The Respondent argues it was privileged to keep the matter confidential. The uncontroverted evidence shows that Gutierrez' discussions were for the purpose of considering the filing of grievances. As decided above, I find that the Respondent was not privileged to prohibit employees from discussing their concerns about Conn's medical restrictions when it had an effect on their terms and conditions of employment. I find that the Respondent did, to the extent that Guitierrez' 3-day suspension was based on such discussions, violate Section 8(a)(1) and (3) of the Act.

The Government further contends that by inquiring into employees' discussions concerning Conn's medical condition the Respondent unlawfully interrogated them concerning their protected activities. The Respondent denies that such questioning is unlawful. Under all the circumstances, including the threat of discipline, I find that Duca' questioning of Gutierrez about his discussions with fellow employees was unlawful interrogation in violation of Section 8(a)(1) of the Act.

I do not find that Duca violated Gutierrez' *Weingarten* rights in this meeting as the Government alleges. Stertz was told he would be allowed to ask questions. Duca stated that he could meet privately at the end of the meeting with Gutierrez, but when Stertz and Gutierrez asked to meet in the middle of the meeting they were allowed to do so. Under all the circumstances I find that Respondent's agents did not violate Section 8(a)(1) of the Act by their conduct in this instance.

IX. MAY 11 WRITTEN REPRIMANDS OF ROMANO AND CONN

Romano had talked to Conn and apologized to her about May 1 and according to Duca the matter had turned into a confrontation between the two employees. On May 11 the Respondent gave written reprimands to Romano and Conn for discussing the matter among themselves. The warnings are similar in language. The reprimand issued to Romano states in part:

On April 24, 1996, during an investigation interview, you were given specific instructions from Employee Relations and EEO not to discuss with anyone awareness of or issues concerning the investigation. In addition, you were told specifically

that you were not at liberty to make an apologetic statement to the employees you suspected alleged the complaints.

On May 2, 1996, Employee Relations and EEO were made aware that you, in fact, did approach an employee on May 1, 1996, and engaged in a discussion of the allegations and offered your apology.

You are being issued this written reprimand for inappropriate behavior and failure to follow management's instructions. (G.C. Exh. 10.)

The reprimands given to Conn and Romano do not mention any confrontation. Both reprimands focus on the employees ignoring orders of management and discussing the matter. I find that the two employees were conversing about a work-related matter, i.e., Conn's complaint, the accusations it made concerning Romano and his desire to apologize for any misunderstanding. I find that this discussion is concerted protected activity and the resulting reprimands issued to the two employees were violations of Section 8(a)(1) and (3) of the Act.

X. GUTIERREZ' SUSPENSION AND DISCHARGE

On January 22, 1997, Gutierrez lost a hub cap off his truck as he was entering work for the day. He did not stop to retrieve the hub cap as he thought he would be late to work. Later in the day Gutierrez left his post, drove the approximately 2-mile round trip to get the hub cap and returned to work. He was absent from work for approximately 20 minutes. Gutierrez did not ask for permission to leave the plant premises nor notify any one of his absence from the plant. The Respondent ultimately learned of Gutierrez' unauthorized absence and on January 28 initiated an investigation into the matter. Gutierrez was suspended pending the outcome of the investigation.

Gutierrez was terminated on January 30 for leaving work without permission and after "careful consideration of your past work record." (G.C. Exh. 5.) Duca stated she probably would not have discharged Gutierrez for the hub cap incident alone. Duca testified that she made the recommendation to terminate Gutierrez and she took into consideration the discipline that was active on his record. That discipline included his May 2 3-day suspension for his inappropriate remarks to Piccioni and for discussing the investigation with fellow employees. It also included his April 24 counseling for inappropriate comments and behavior in discussing the Conn matter. Duca gave Buehler a summary of Gutierrez' disciplinary record and he approved her discharge decision. (G.C. Exh. 8.) Buehler did not testify at the hearing.

XI. ANALYSIS OF GUITERREZ' SUSPENSION AND TERMINATION

The Government alleges that Gutierrez' January suspension and termination were the result of his protected activities. The Respondent argues that Gutierrez was properly suspended and discharged for leaving work without permission. The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); *Manno Electric, Inc.,* 321 NLRB 278 (1996). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

Gutierrez was engaged in protected activity in April when he discussed Conn's medical restrictions with others. The Respondent had knowledge of this protected activity. The violations of the Act discussed above are requisite proof of Respondent's animus. The Respondent admittedly took into consideration Gutierrez prior disciplinary record to justify his discharge. Part of that disciplinary action has been found to have been unlawfully imposed. The Respondent admittedly would not have discharged Gutierrez without considering his full disciplinary record. I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Gutierrez, in part, because of his prior protected activity. *Soltech, Inc.,* 306 NLRB 269, 279 (1992); *Jhirmack Enterprises*, 283 NLRB 609 fn. 2 (1987).

The complaint alleged Gutierrez January 28 suspension violated the Act. That suspension pending investigation was not shown to have been based on his prior disciplinary record. Nor do I find that suspension was a pretext to mask a motivation to punish him for protected activities. Thus, the Government has not proven by a preponderance of the evidence that Gutierrez' January suspension was based on his earlier protected activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of Act by suspending Gutierrez in January.

CONCLUSIONS OF LAW

1. Lockheed Martin Astronautics is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Plant Guard Workers of America, Local 265 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]